IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5124 of 2000
with
SPECIAL CIVIL APPLICATION No 5125 of 2000
with
COMPANY PETITIONS NO. 31 and 32 of 2000
with
COMPANY APPLICATION No.446 of 2000 in Co.Petn.31/2000
with
COMPANY APPLICATION No. 288 of 2000 in Co.Petn.32/2000

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MADHU FABRICS LTD

Versus

STATE BANK OF INDIA

Appearance:

1. Special Civil Application No. 5124 of 2000
MR KG VAKHARIA,Sr.Counsel with MS AVANI S MEHTA for Petitioner.
DR SONIA HURRA for Respondent No. 1
MR RM DESAI for Respondent No. 2
SINGHI & BUCH ASSO. for Respondent No. 3
MR RM DESAI for Respondent no.4.
MR PK SHUKLA,AGP for Respondent No. 6, 7

2. Special Civil ApplicationNo 5125 of 2000

MR KG VAKHARIA,Sr.Counsel with MR TUSHAR MEHTA for Petitioner

DR SONIA HURRA for Respondent No. 1

MR AS VAKIL for Respondent No. 2

MR RM DESAI for Respondent No. 3

SINGHI & BUCH ASSO. for Respondent No. 5

MR PK SHUKLA,AGP for Respondent No. 7

CORAM : MR.JUSTICE K.R.VYAS

Date of decision: / /2001

CAV JUDGEMENT

1. The petitioners M/s Madhu Fabrics Ltd. and M/s Madhu Textiles Ahmedabad Limited, by filing Special Civil Application No.5124 and 5125 of 2000 respectively, have challenged the orders dated 14.2.2000 passed by the Board for Industrial and Financial Reconstruction (In short, 'BIFR') annexure A and order dated 4.5.2000 passed by the Appellate Authority for Industrial and Finance Reconstruction (In short, 'AAIFR') annexure B. The BIFR, after considering the facts, opined that the petitioner company is not likely to become viable in future and, therefore, it is just, equitable and in public interest that it should be wound up under section 20(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 (In short, 'SICA'). AAIFR, in appeal, confirmed the said order.

2. Company Petition No. 31 of 2000 is for consideration of Board opinion in the matter of M/s Madhu Fabrics Limited while Company Petition No. 32 of 2000 is for consideration of Board opinion with respect to M/s Madhu Textiles Ahmedabad Limited. The petitioner M/s Madhu Textiles Ahmedabad Limited has also filed Company Application No. 288 of 2000 in Company Petition No. 32 of 2000 seeking directions to convene a meeting under section 391 of the Companies Act, 1956 (In short, 'the Act'). In the affidavit in support of judge's summons, the petitioner M/s Madhu Textiles presented a scheme to rehabilitate. Similarly,M/s Madhu Fabrics also presented a scheme to rehabilitate by filing Company Application No. 446 of 2000 in Company Petition No. 31 of 2000. Both the petitioners also produced the very scheme for rehabilitation by way of draft amendment in their respective petitions.

3. Since the order of BIFR as well as AAIFR is under challenge in the petitions and this Court is required to consider the opinion of BIFR for passing the order of winding up, Special Civil Applications as well as Company Petitions and Company Applications were heard together and are disposed of by this common judgment and order.

4. The petitioner M/s Madhu Fabrics Limited is engaged in the business of process of grey cloth, printing, dyeing and bleaching of fabrics; faced financial difficulties because of the circumstances beyond control in the year 1991-92. The petitioner made reference under section 15 of SICA to the BIFR which was registered as Case No. 74 of 1992. In the said reference, the scheme was approved by an order dated 22nd August 1995 by the Board. It appears that the said scheme was approved on the basis that the petitioner Company would be getting sufficient job work from different exporters. Even though the petitioner Company made efforts to restart the unit, however,it could not succeed. It appears that in view of many hurdles in the implementation of the scheme, the Board directed the petitioner Company to submit a workable rehabilitation proposal within four weeks from 25.11.1999 on which day, a joint meeting was held at BIFR, New Delhi. The Board further directed the petitioner Company to deposit 25% of the cost of the proposal in an interest bearing No Lien Account within a month from 25.11.1999. It is the case of the petitioner that the promoters had agreed to pay a sum of Rs. 80 lakhs against OTS (One Time Settlement) of the dues of secured creditors, financial institutions and banks. However, before the expiry of the aforesaid period and without the consent or even the knowledge of the petitioner, an advertisement dated 11.12.1999 was published by the Board in daily Jansatta published from Ahmedabad giving a notice for winding up of the Company and the said advertisement seriously affected the petitioner Company's reputation and all sources of collection of money by the promoters of the Company.

5. The petitioner M/s Madhu Textiles Ahmedabad Limited is engaged in the business of blended yarn; faced financial difficulties because of the circumstances beyond control in the year 1991-92. Therefore, it made a reference under section 15 of SICA to the BIFR which was registered as Case No. 76 of 1992. Thereafter, the scheme was approved by an order dated 22nd August 1995 by the Board. It is the case of the petitioner that after the scheme was approved, the petitioner Company had paid Rs. 248 lakhs out of the total amount of Rs. 896.26

lakhs of the sanctioned scheme. The petitioner Company also faced major hurdles on account of workers strike, unforeseen fall in the value of the stock comprising of raw material viz. Polyester staple fibre from Rs.110/- to Rs.40/- per kg., general recession and failure on the part of the Government of Gujarat to grant relief and concessions as per the scheme dated 22nd August 1995 within stipulated time limit etc. It is the further case of the petitioner that since the scheme was sanctioned, the petitioner had also brought capital to the extent of Rs. 355 lakhs for smooth running of the unit.

In view of the above hurdles in the implementation of the scheme, another scheme was proposed which was agreed by the creditors in a joint meeting held on 17.11.1999. After the said meeting, the Board had convened a meeting on 22.11.1999 for discussion of the aforesaid proposal. In the said meeting, there was consensus of agreement regarding the scheme proposed by the petitioner. As per the scheme, the petitioner Company was required to deposit Rs. 1 crore in No Lien Account with operating agency viz. IDBI on or before 25th December 1999. It is the case of the petitioner that before the expiry of the aforesaid period and without the consent or even the knowledge of the petitioner, an advertisement dated 10.12.1999 was published by the Board in daily Jansatta, Ahmedabad Edition, giving notice for winding up of the Company which has seriously affected the Company's reputation and affected all the sources of collection of money by the promoters of the Company. It is the case of the petitioner that even though the consensus scheme which was approved in the meeting dated 17th and 25th November 1999 was pending for consideration, the Board passed an order dated 14.2.2000 at annexure A observing that the promoters were not serious in rehabilitating the company nor were they resourceful enough to mobilise the funds and ultimately recommended winding up under section 20(1) of SICA. The appeal preferred by the petitioner was rejected. Hence, the petition.

6. Mr.K.G.Vakharia, learned Senior Counsel appearing for the petitioners challenged the impugned orders at Annexures A and B recommending winding up of the Company by contending that drastic recommendations for winding up are not justified in the facts and circumstances of the case. He submitted that in pursuance of the scheme which was sanctioned on 22nd August 1995, the promoters of the petitioner Company brought the capital of Rs. 355 lakhs to keep the business running; paid Rs. 248.42 lakhs to the financial institutions and paid Rs. 80 lakhs towards

the workers dues. In the submission of Mr. Vakharia, the total amount paid during the pendency of the scheme is Rs. 683.42 lakhs. Therefore, in the submission of Mr. Vakharia, the observations of the Board that the scheme has remained un-implemented for a period of five years are not correct. Mr. Vakharia pointed out the circumstances which were beyond the control of the petitioners and, therefore, the remaining part of the scheme could not be implemented. According to him, because of the strike of the workers in September 1995 which continued for a period of five months, the unforeseen reduction in the price of stock comprising of raw material viz. Polyester staple fibre and the failure on the part of the Government of Gujarat to grant reliefs and concessions as per the scheme which come to about Rs. 1.13 crores within the stipulated time and the general recession were the circumstances beyond the control of the petitioners. Mr.Vakharia further submitted that even though the consensus was arrived at regarding the proposed scheme in the meeting dated 17.11.1999 and 25.11.1999 whereby the promoters of the Company had agreed to pay 20% of Rs. 4 crores which would have come to Rs. 80 lakhs by inviting resourceful promoters, before that could be done, notice to show cause as to why the Company should not be wound up was published in the newspaper under the directions of the Board on 10.12.1999 which prevented the implementation of the consensus arrived at. By inviting my attention to the scheme for rehabilitation by way of draft amendment, Mr. Vakharia submitted that the Company being a running concern and is likely to come out from all difficulties, order to wind up the Company is not called for. Alternatively, it was submitted that the case may be remanded to BIFR for considering the scheme for rehabilitation.

7. Mr.Roshan Desai and Mr. Singhi, learned Counsel appearing for IDBI and ICICI respectively, the financial institutions, submitted that ample opportunity was given to the petitioners and they failed to avail of the same and, therefore, no interference is called for. In the submission of the learned Counsels, this Court cannot sit as a Court of Appeal over the decision of the expert body and scrutinise the facts to reach to the conclusion whether the orders passed by the expert body are right or not. As far as the scheme for rehabilitation submitted by the petitioners is concerned, while strongly objecting to the same, it was contended that if a particular class (secured creditors) which is present before the Court objects per se for sanctioning the scheme, then it would be an empty formality to direct to hold the meeting as the scheme, under any circumstances, cannot be

sanctioned. It was further contended by the learned Counsel appearing for the financial institutions that by filing section 391 scheme, the petitioners have waived their right to challenge the orders of BIFR and AAIFR.

8. Mrs.Sonia Hurrah, learned Counsel appearing for the State Bank of Travancore and State Bank of India and Mr. A.S.Vakil, learned Counsel appearing for the State Bank of Saurashtra, while adopting the submissions of the learned Counsel for financial institutions, opposed the scheme for rehabilitation by contending that nothing is offered to banks.

9. Mr.D.S.Vasavda, learned Counsel appearing for Majoor Mahajan Sangh supported the petitioners by contending that the winding up of the companies will be against the interests of the workers.

10. In the instant case, the bench of BIFR, after considering the facts and circumstances of the case and particularly the scheme for rehabilitation, observed that:

> "xxx the promoters were not serious in rehabilitating the company nor were they resourceful enough to mobilise the funds required for this purpose. As such, there was no rehabilitation proposal with means of finance fully tied up, for consideration of the Board despite ample opportunities having been given to all concerned. Under the circumstances, the Bench confirmed its prima facie opinion that the Sick Industrial Company- M/s Madhu Textiles Ahmedabad Ltd.(MTAL) was not likely to make its net worth exceed its accumulated losses within a reasonable time while meeting all its financial obligations and that the company as a result thereof, was not likely to become viable in future and hence it was just, equitable and in public interest that it should be wound up under section 20(1) of the Act."

The plain reading of the conclusion reached by BIFR makes it clear that ample opportunities have been given to rehabilitate the companies and the petitioners were not resourceful enough to mobilise funds required for rehabilitation purpose. The respondent no.5 ICICI, in its affidavit-in-reply, has given details of opportunities given to both the petitioners. It is stated that in the year 1989, as the petitioners had failed to repay the loans of financial institutions and

the banks including the respondent no.5, the respondent no.5 granted relief by way of re-schedulement of loans, funding of unpaid interest and waiver of penal interest and liquidated damages. However, the petitioners failed to honour their commitments even as per the said reliefs granted by respondent no.5. It is further stated that the petitioners thereafter were declared sick industrial companies and BIFR had sanctioned rehabilitation scheme in the year 1995. However, the petitioners failed to honour commitments and also failed to repay the dues of financial institutions including the respondent no.5. On 2.4.1997, status report with regard to the implementation of the sanctioned rehabilitation scheme was reconsidered by BIFR. Once again, opportunity was given to the petitioners to negotiate with the financial institutions including the respondent no.5 for revised OTS scheme. The petitioners miserably failed to come with an acceptable and fully tied up revised OTS proposal and the scheme formulated by the petitioners was rejected by the financial institutions. Even thereafter the rehabilitation scheme was further considered by BIFR at the hearing which took place on 4.9.1998. BIFR once again granted time to the promoters of the petitioners to come out with a concrete offer with regard to the repayment of dues of the financial institutions and it was made clear to the petitioners that if the proposals made by the petitioners are not acceptable to the financial institutions including respondent no.5, BIFR would issue notice for winding up of the companies without any further hearing being given to them. The petitioners submitted their revised OTS which was not acceptable to the financial institutions. As there was no concrete proposal coming forth from the promoters of the petitioners, the Operating Agency, viz. IDBI informed BIFR that the rehabilitation scheme had failed and the financial institutions may be permitted to recover the liabilities due and payable by the petitioners by initiating legal action against the petitioners and their promoters. Thereafter on 21.6.1999, the promoters of the petitioners gave two alternative proposals to the financial institutions which were considered by the financial institutions in their joint meeting held on 17.11.1999. It appears that the promoters of the petitioners failed to indicate the source of funds for repayment of the dues of the financial institutions and banks and also failed to identify clearly the copromoter who was to induct funds for repayment of the said dues. When the aforesaid facts were placed before BIFR at the hearing that took place on 25.11.1999,BIFR noted that the promoters of the petitioners failed to identify specifically the

copromoter who was to induct funds and to disclose the source from which funds were to be brought for repayment of dues of the financial institutions. Even in the joint meeting held on 17.11.1999, the promoters of the petitioners had stated that funds would be brought through the sale of the promoters' personal properties. However,no details were given either at the said joint meeting or at the hearing before BIFR on 25.11.1999.

11. In view of the aforesaid background, the BIFR issued aforesaid show cause notice as indicated to the petitioners and their promoters in the meeting held on 4.9.1998 to the effect that if a fully tied-up proposal is not put forward by the promoters of the petitioners, BIFR would issue show cause notice for winding up of the petitioners without any further hearing. It is to be stated that despite the issuance of the show cause notice on 25.11.1999, BIFR once again gave time to the promoters of the petitioners to come with a concrete rehabilitation proposal and in order to show the bonafide of the promoters in the rehabilitation of the petitioners, the petitioners were asked to deposit 25% of the cost of the proposal in the interest bearing No Lien Account. Even after the show cause notice was issued by the BIFR vide its order dated 25.11.1999,the promoters of the petitioners failed to bring in any fully tied-up comprehensive workable rehabilitation proposal and also failed to deposit 25% of the cost of the proposal in an interest bearing No Lien Account.

12. It is the contention of the petitioners that in view of the publication of show cause notice, the third parties resiled from bringing any money for the petitioners. In my opinion, the said submission is nothing but an afterthought. As stated above, the petitioners having failed to clearly identify the copromoter both at the time of joint meeting and before the BIFR, the BIFR was justified in issuing the show cause notice, in view of the fact that at the time of hearing before the BIFR on 14.2.2000, the petitioners failed to bring in any fully tied-up comprehensive workable rehabilitation proposal and also failed to deposit 25% of the amount of proposal in interest bearing No Lien Account. Thus, sufficient opportunities from time to time were given to the petitioners to come out with the concrete rehabilitation scheme including revised schedule for repayment of the dues of the financial institutions, but the petitioners failed either in payment of OTS amount payable to the financial institutions or in coming forward with concrete scheme for rehabilitation of the petitioners.

13. Surprisingly, in the appeal preferred before AAIFR, no scheme for rehabilitation was presented. Reading the judgment of the AAIFR, it appears that the petitioners offered to deposit through promoters Rs. 50 lakhs in No Lien Account within reasonable time so that the petitioners can come out with a proposal. AAIFR rightly observed that the debt of the petitioners to the financial institutions/ banks is so large that the deposit of Rs. 50 lakhs in interest bearing No Lien Account would be of no avail. It is further observed that:

> "Repeated opportunities have been given to the appellants by BIFR over a period of more than seven years. A scheme based on substantial sacrifices by creditors was also sanctioned, but it failed because the appellants could not fulfil their obligations. Now, the appellants have not even placed any proposal with the Memorandum of Appeal. There is no possibility of rehabilitating MIAL."

Thus, when the expert body like BIFR, after scrutinising the facts, reaching a definite conclusion, the question that arises for my consideration is whether this Court can sit as a Court of Appeal over the decision of the said expert body ?

14. Mr.Vakharia, learned Counsel for the petitioners invited my attention to the decisions of the Apex Court rendered in the case of Election Commission of India Vs. Ashok Kumar and ors., JT 2000 (9) SC 529. That was a case where the notification of election was issued and published in the official gazette and validity of the same was challenged. In the said petition, instructions issued by the Election Commission for counting by distributing ballot boxes of one polling station at one table was challenged and the High Court granted interim relief suspending the notification and gave direction for counting boothwise. The question before the Apex Court was whether the High Court had jurisdiction to entertain the petitions and to issue interim directions after commencement of electoral process. It was held that the petitioners had not made out any case for intervention of High Court and, therefore, the orders passed by the High Court were set aside. My attention has been invited to the observations made by the Apex Court regarding the constitutional status of the High Court and the nature of jurisdiction exercised by the High Courts. The Apex Court observed that:

"High Courts in India are superior courts of record. They have original and appellate jurisdiction. They have inherent and supplementary powers.Unless expressly or impliedly barred and subject to the appellate or discretionary jurisdiction of the Supreme Court,the High Courts have unlimited jurisdiction including the jurisdiction to determine their own powers. "

There cannot be any dispute with regard to the principle laid down by the Apex Court. In my view, the High Court, by exercising its inherent powers, cannot sit as a Court of Appeal over the decision of an expert body.

15. Even though High Court exercises judicial review over administrative and quasi judicial authorities, its powers are limited and the High Court shall confine its powers to see:

(1) Whether a decision making authority exceeded its powers?
(2) committed an error of law;
(3) committed a breach of the rules of natural justice;
(4) reached a decision which no reasonable Tribunal would have reached, or
(5) abused its powers.

16. I am supported by the decision of the Delhi High Court rendered in the case of KMA Ltd. Vs. Union of India and ors., (1997) 1 Comp.LJ 343 (Del). In the said decision, Delhi High Court observed that the jurisdiction of the Court exercising powers under Article 226 of the Constitution of India is limited and the Court has no power and jurisdiction to sit over and scrutinise the powers of the appellate authority as a Court of Appeal. This Court has only to find out whether the order of the appellate authority is within the frame work and ambit of SICA.

17. Delhi High Court, in the case of ARC Cement Ltd. Vs. AAIFR, AIR 1998 Delhi 359 also reiterated the same view. There also, it was held that the expert body such as operating agency, after scrutinising the matter and recommending the company for being wound up and not for revival, no interference by the High Court was called for.

18. Supreme Court,in the case of U.P.Financial Corporation Vs. Maine Oxygen and Acetylene Gas Ltd.,

(1995) 2 SCC 754 held as under:

"However,we cannot lose sight of the fact that the Corporation is an independent autonomous statutory body having its own constitution and rules to abide by, and functions and obligations to discharge. As such, in the discharge of its functions, it is free to act according to its own light. The views it forms and the decision it takes are on the basis of information in its possession and the advice it receives and according to its own perspective and calculations. Unless its action is malafide, even a wrong decision taken by it is not open to challenge. It is not for the Courts or a third party to substitute its decision, however, more prudent, commercial or business like it may be, for the decision of the Corporation. Hence, whatever the wisdom (or lack of it) of the conduct of the Corporation, the same cannot be assailed for making the Corporation liable. "

In view of this, it is not possible for me to take a different view in the matter. Suffice it to say that no illegality has been committed by BIFR or AAIFR nor is it shown that the orders are malafide, warranting interference in the matter.

19. Frankly speaking, learned Counsel for the petitioners is not entitled to challenge the orders passed by BIFR and AAIFR as in my opinion,on filing section 391 scheme, the petitioners have waived their right to challenge the orders of BIFR as well as AAIFR. It is not the case of the petitioners that they presented the scheme before the authorities and the authorities have not considered the same. As stated above, by filing a scheme for rehabilitation under section 391 in Company Petition and also presenting the same in writ petitions by way of draft amendment, the petitioners, in my opinion, have waived their right to challenge the orders of BIFR and AAIFR. Therefore, both the petitions are required to be rejected even on this ground.

20. Mr. Vakharia for the petitioners, however, submitted that this Court can certainly take into consideration the subsequent factors, viz. presentation of rehabilitation scheme by the petitioners. Reliance is placed by him on the decision of the Supreme Court in the case of Cresent Iron & Steel Corporation Ltd. Vs. Union of India and anr., (1992) 4 SCC 680. In that case, the appellant Crescent Iron and Steel Corporation Limited, a

private limited company was running a foundry. The appellant declared lock out in his foundry in July 1985. The appellant Company made a reference to BIFR. During the pendency of the said reference, the appellant Company made an application to the State of Maharashtra under section 25(O) of the Industrial Disputes Act to close down the undertaking located at Goregaon and requested BIFR for reviving the undertaking at another location, preferably in backward area of Maharashtra. The appellant Company also alleged to have paid up all secured and unsecured creditors as well as all the workers employed in the foundry. BIFR, on February 15,1991, passed an order proposing the winding up of the appellant Company. On May 16, 1991, at the general meeting of the appellant Company, a special resolution was passed by the shareholders that the order of BIFR dated February 15, 1991 was not in the interest of the company. The appellant Company forwarded the aforesaid special resolution along with a letter dated May 21,1991 requesting the BIFR to revoke its order dated February 15,1991. The BIFR vide its order dated May 23,1991 observed that it was not possible to adopt any measures for revival of the Company and reiterated its stand that the appellant Company should be wound up.

21. Being aggrieved by the said order dated May 23, 1991, the appellant Company filed an appeal before the appellate authority for Industrial and Financial Reconstruction, New Delhi. The appellate authority, by its order dated September 13, 1991 upheld the order of the BIFR and did not find any reason to take a different view. The appellate authority further held that even carrying out the same activity at the new site does not constitute rehabilitation of a sick unit. It also held that developing of the land for commercial activity also does not constitute rehabilitation of a sick unit and there was no provision in the SICA to drop a case, once a reference has been made and heard by the BIFR. The said order was challenged before the Supreme Court. Considering the facts of the case, the apex Court held that the BIFR and the appellate authority are authorised to take into consideration the facts and circumstances of each case and then to decide whether any reference under section 15(1) of the SICA was at all necessary or not and to pass any other appropriate order meeting the ends of justice in each case. Hence, the matter was remanded to the BIFR for passing a fresh order in accordance with law.

That was the case where the proceedings were pending before BIFR and permission was sought to close

down its undertaking and to revive the undertaking at another location which was turned down by BIFR and, therefore, the matter was remanded by the apex court to BIFR for passing a fresh order. That is not the case here. As observed earlier, in spite of ample opportunities given to the petitioners, no scheme for rehabilitation was presented. The presentation of scheme for rehabilitation by way of draft amendment in the main petitions is nothing but a further attempt to continue the proceedings and thereby to take advantage of the provisions of SICA.

22. Assuming that the proposed scheme presented by the petitioners is to rehabilitate and to revive the company, in my opinion, no useful purpose will be served by remanding the matter to BIFR for passing a fresh order on reconsideration especially when the secured creditors who are class by themselves present in the court are objecting per se for sanctioning of the scheme. Therefore, I am of the opinion that it would be an empty formality to remand the matter and/ or to hold the meeting to consider the scheme of revival and rehabilitation.

23. Even Delhi High Court in the case of Komal Plastic Industries Vs. Roxy Enterprises Pvt.Ltd., 72 Co.Cases 61, held that:

> " since the State Bank of India was the only secured creditor of the company and was opposed to the scheme of arrangement propounded under section 391, this amounted to opposition to the scheme by 100% of the class of secured creditors. The scheme propounded was a composite scheme covering both secured and unsecured creditors and in view of the stand of the State Bank of India, no useful purpose would be served by directing the convening of meetings to consider the scheme. The applications filed under section 391 were liable to be dismissed."

24. Karnataka High Court in the case of K.R.Balasubramanyan Vs. Bellary Spinning and Weaving Co.Ltd., 84 Co.Cases 830 has also taken a similar view. That was a case where the respondent company was ordered to be wound up under section 433 (e) and (f) of the Companies Act, 1956. Its liabilities amounted to Rs. 2.5 crores. An appeal against the winding up order was dismissed. The erstwhile Managing Director of the company filed an application under section 391(1) for calling a meeting of the equity shareholders and unserved

creditors of the company, for considering a scheme of revival of the company. The second respondent bank, the sole secured creditor of the company, opposed the scheme which proposed a payment of Rs. 1.5 crores to the bank in full and final settlement of its dues as against a sum of about Rs.5 crores which the company owed it. Considering this fact, it was held that 100% of the secured creditors were opposing the scheme and, therefore, it would be an idle formality to direct to convene the meeting of unsecured creditors to consider the scheme.

In the instant case also, the scheme was sanctioned in 1995. In the case of petitioner Madhu Fabrics, nothing as on date has been paid to the financial institutions and in the case of Madhu Textiles, financial obligations, as agreed,have not been fulfilled. The expert bodies like BIFR and AAIFR have recorded a finding that the promoters of the petitioners were not serious enough to rehabilitate the petitioners companies nor were they resourceful enough to mobilise funds for the purpose. In fact, there was no rehabilitation proposal, with means of finance, fully tied-up despite ample opportunities having been given to all concerned. As far as the petitioner Madhu Fabrics is concerned, BIFR in its minutes recorded on 4.9.1998 has observed that the scheme has not been supported. Thus, ample opportunities having been given, no scheme is proposed. Even in the scheme for rehabilitation presented before this Court, nothing has been stated regarding the clearance of dues of banks, namely State Bank of Saurashtra, State Bank of India and State Bank of Travancore. The total dues of State Bank of India and State Bank of Travancore, as on 30.11.2000, are Rs. 13,20,00,806.82 as can be seen from the affidavits filed by the concerned banks. Needless to say that the said banks also opposed to the scheme proposed by the petitioners under section 391 of the Companies Act.

25. With a view to test the bonafide of the petitioners, I had suggested the petitioners to deposit 25% of Rs. 408 lakhs which was also ordered by BIFR. The learned Counsel Mr. Vakharia, after taking time to seek instructions, ultimately submitted that it is not possible for the petitioners to deposit the amount as suggested by the Court. As stated by Mr. Vakharia, the petitioners, at the most, can deposit 25% of Rs. 325 lakhs within five months. In view of this, it is clear that the petitioners, at present, have no sufficient means and the object behind the scheme is to while away time and to avoid payment to the creditors. The only

factor which is in favour of the petitioners is that the petitioner Madhu Textiles is a running concern. Accounts Clerk Girish Patel of Madhu Textiles has filed an affidavit stating that the petitioner company has started its actual working with effect from 2.8.2000 and substantial number of workmen have been re-employed and the management has started paying them wages. He has stated that the power supply has been restored by the GEB as Madhu Textiles has paid its bill for electricity consumption. Sagarbhai Mafatlal Desai, Member of Majoor Mahajan Sangh, Kadi has filed an affidavit supporting the petitioners by stating that he has been paid wages. A list of 173 workers alleged to have been employed by Madhu Textiles is produced in the record of the case.

26. True, the interest of the workmen is one of the considerations while considering the case of winding up of the company. In the scheme submitted by the petitioners, it has been pointed out that "Go slow" strike by the labour force commenced from January 1997 substantially reduced the production and made the unit not viable and the company had no alternative but to close the unit and accordingly it was closed from April/ May 1997. The approach and attitude of the labourers was highly uncompromising and it was impossible to run the unit and ultimately via media was found out through negotiations and by way of settlement, Rs. 55 lakhs were paid towards legal dues of the labour force. After release of uncompromising labour force, the promoters engaged about 150 labourers with whose help the unit has again started from August 2000.

27. In view of this, it is clear that the company has re-employed hundreds of workers in the month of August 2000 against the strength of thousands of workers. Most of the units are closed. Thus,in the name of the workers, who are quite few in number, manufacturing activities cannot be allowed to continue, especially when dues of the financial institutions and secured creditors running into crores of rupees have remained outstanding. These workers can be re-employed by the new management provided running concern M/s Madhu Textiles is taken over by new management and it desires to run the unit.

28. In view of the above, I see no merits in Special Civil Applications No. 5124 and 5125 of 2000 and hence the following order:

Special Civil Applications No. 5124 and 5125 of 2000 are rejected.

Company Petitions No. 31 of 2000 and 32 of 2000 are admitted. To be heard on 14th February 2001. Official Liquidator is appointed provisionally to take charge of the movable and immovable properties of M/s Madhu Fabrics Ltd. and M/s Madhu Textiles, Ahmedabad Ltd. with a further direction to take inventory and submit report to this Court. Till the hearing of Company Petitions, the management may run M/s Madhu Textiles, but the purchase of raw materials or any other items for running unit shall be made after approval of the Official Liquidator. No payments except fulfilling statutory obligations, payments to workers and daily expenses, shall be made without the concurrence and approval of the Official Liquidator. Hereinafter, realisation of sale proceeds shall be credited in nationalised bank in a separate account.

The Official Liquidator shall be at liberty to obtain appropriate orders from this Court in case of any difficulty.

The hearing of the aforesaid Company Petitions to be advertised in Gujarat Samachar and Indian Express, both Ahmedabad editions. Publication in Government Gazette is dispensed with. The expenses for the advertisement shall be borne by the Operating Agency and that will be treated as the costs of liquidation.

Company Applications No.288 and 446 of 2000 stand rejected.

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